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**Remark:**

Claims 6, 7, 9-18, 40, 49 and 52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Spackova et al. in view of Aisaka et. Al.

**(A) Legal position of process claim:**

As submitted in the previous response dated 05/05/2008, the applicant argued that the office action erred in using a system disclosure that did not recite the claimed process steps to reject the subject claims that are defined by precise process steps. According to the latest office action, on page 6 the examiner disagreed and insisted that a system description can be used to anticipate steps of actions. This disagreement is to be resolved according to patent law. Listed below is a quotation of MPEP section 2112.02 that layout the condition when a system device can be used to anticipate a process claim:

**2112.02 Process Claims****PROCESS CLAIMS — PRIOR ART DEVICE ANTICIPATES A CLAIMED PROCESS IF THE DEVICE CARRIES OUT THE PROCESS DURING NORMAL OPERATION**

Accordingly it is required to evaluate if the device or system of Spackova really carried out the subject claimed processes during the normal operation of Spackova?

**(B) What exactly Spackova had disclosed?**

Close evaluation of Spackova indicated that the system of Spackova comprises a video camera 76 that captures the moving image of a person (30, 77) who wears a form fitted reference garment 71. This reference garment contains multiple segments 72 and each segment contains a coded indicia 74 (col. 4, lines 1-7). Spackova further comprises a video recorder 78 that records the moving image of the person captured by the camera 76 (col. 4 lines 10-13). Spackova's system further comprises a computer 80 that retrieves graphic specifications 85, 86 of a high polarity of garments, each comes with segments corresponds to the segments of the form fitted image captured by the camera (col. 4 lines 15-20). The computer of Spackova is also programmed to identify and recognize the orientation of the segments provided on the form fitted garment wear by the person (col. 4, lines 8-9). During a normal operation, the system of Spackova make

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use of a digital image processor 79 that accepts video image of the person, either directly from the video camera, or from the video recorder (col. 4, lines 13-15). The computer 80 and digital image processor 79 then modify or re-image the segments of the selected garment to replace the corresponding segment of the form fitted segments images of the person to display on a monitor 91 (col. 4 lines 29-35). The remaining part of Spackova describes how a segment 72 makes use of a triangular indicia to provide orientation information in the x-y-z directional axis (FIG. 2A-2C; col. 3, lines 50-56). The normal operation of Spackova is to make use of the above system to show a moving image of a person wearing a garment selected.

**(C) What limitations had been claimed and how these limitations are compared with the cited references?**

Listed below is a recitation of independent claim 40. The reference information inside the brackets are the quotations provided by the office action that showed how the office action equates each limitation of the claimed process with that of the cited prior arts:

**40. A method of processing a body profile (BP) code describing the physical dimensions of a human body (30, 77) to facilitate garment shopping, said method comprising the steps of:**

- (1) specifying the positions of the body (30, 77) to be measured (indicia 74 shown in Fig. 3 specify the position) for defining m different physical dimensional parameters of said human body (indicia segments 72 and coded indicia 74 are used to define various physical parameters of a subject wearing a form fitting garment, col. 4, line 1+, see Fig. 3);**
- (2) measuring in length unit (x-y-z are axes for dimensions of length, col. 3, line 55) each of said m defined parameters (the orientation of each segment 72 and indicia 74 are computer identified, measured and stored, col. 4 line 7+) a physical dimension of said body to produce m values; and**
- (3) processing said m values (computer and image processor process orientation information, col. 3 line 12-15, the form fitting garment 71 contains a polarity of coded segments 72 which are used in toto to form a composite image of the garment, and therefore, of the subject's body since the garment is form fitting col. 4 line 1+) to produce a multiple digits compressed (Ref Aisaka - No. 5, M, XL, etc., col. 1 line 7-20, the office action also indicated at bottom of page 4 that the m values are**

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*compressed by mathematical process so it can be decompressed ) BP code for representing said m values (the stored data for the composite image would result in a multi-digit code that represents the particular features – m values – for that body).*

The examiner is respectfully requested to "precisely" compare the claim limitations of each step with the corresponding equivalence quoted by the office action, to see if every limitation recited in each claimed step had really been carried out during the normal operation of Spackova:

**(D) Comparison of Step (1):**

First of all, it is obvious that Spackova never indicated the intention in its normal operation to define the positions between two segments nor the positions between two indicia as a parameter. Secondly, Spackova never disclosed any intention in its normal operation to "measure" a parameter, interpreted as the distance between two segments, or indicia. Accordingly these two limitations are imaginative conclusion of the office action derived after reading the disclosure of the subject application. If the examiner disagrees, the examiner is respectfully requested to precisely quoting the numeric numbers of a figure, column and lines of Spackova's disclosure showing how these two limitations of process steps are explicitly shown in the disclosure of Spackova during its normal operation? Of course the interpretation to answer this question is required to satisfy the ordinary person rule when interpreting the terms of a claim, as required by the patent law.

The office action did not indicate if the ground of rejection was based on an assertion that the Spackova system may be capable to be used to produce the two process limitations claimed even when these process limitations are not explicitly disclosed in Spackova. This issue is to be discussed in section (G) herein.

**(E) Comparison of Step (2):**

The office action indicated that the x-y-z axis are length units that satisfies the process limitation claimed in step (2). In fact, Spackova clearly indicated the x-y-z axis are used to shown the rotational orientations of the triangular indicia, so as for the system to modify or re-image the article wear by then person the person is moving or rotating. As a common sense for any person having ordinary knowledge in the art, orientation

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information described in x-y-z- axis are measured in "angular units", not length unit as claimed. If the examiner disagrees, the examiner is respectfully requested to precisely quoting the numeric numbers of a figure, column and lines of Spackova's disclosure showing Spackova did measured the x-y-z- axis of each triangular in linear units, and not in angular units. Of course the answer is required to satisfy the ordinary person rule when interpreting the terms of a claim, as required by the patent law.

The office action did not indicate if the ground of rejection was based on an assertion that the Spackova system may be interpreted to be x-y-z coordinates of a point in a three dimensional space. Even if this is the case, then the interpretation will make the system of Spackova not working because linear unit measurements of a triangular Indicia in the x axis, y axis and z axis will fail to inform how the triangular Indicia is rotated, when it's orientation is changed; according to the original design intention of Spackova.

**(F) Comparison of Step (3):**

Firstly, the office action erred to state that Alsaka disclosed a compressed code for human body. Carefully reading col. 1, lines 8-11, Alsaka clearly mentioned the traditional size Indicator systems "for garment" in the market and not "compressed" body profile code "for person" as claimed. Listed below is a quotation of MPEP 2111.01 III:

*"[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application."*  
*Phillips v. AWH Corp.*, \*415 F.3d 1303, 1313<, 75 USPQ2d 1321>, 1326<  
(Fed. Cir. 2005) (en banc). *Sunrace Roots Enter. Co. v. SRAM Corp.*, 336 F.3d 1298, 1302, 67 USPQ2d 1438, 1441 (Fed. Cir. 2003); *Brookhill-Wilk I, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1298 67 USPQ2d 1132, 1136 (Fed. Cir. 2003)

Listed below is a further quotation from 37 C.F.R. 1.107(b):

*When a rejection in an application is based on facts within the personal knowledge of an employee of the Office, the data shall be as specific as possible, and the reference must be supported, when called for by the applicant, by the affidavit of such employee, and such affidavit shall be*

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*subject to contradiction or explanation by the affidavits of the applicant and other persons.*

According to understanding of a person having ordinary knowledge in the art, due to different environment of application, there are significant differences between garment size indicators currently used in the market, as mentioned in Alsaka and compressed BP Code system for person, as claimed in the subject application. For example, it is proper to indicate a garment of a particular brand to be of multi-digit sizes such as 32, 34. However, it is awkward and against of the ordinary person rule to portray a person's body size with an indicator of 32, 34 because any ordinary person in the art knows that sizing system varies from brand to brand (also mentioned in Alsaka, col. 1, lines 14-18). Therefore using the market garment size indicator system to describe the body size of a person is an imaginative interpretation of the office action within the personal knowledge of the examiner. Accordingly, applicant courteously requested that if the rejection is maintained, the examiner is respectfully requested to provide other evidence or submit an affidavit under 37 C.F.R. 1.107 (b) providing citation regarding level of skill in the art and why it is appropriate to interpret Alsaka's garment sizing system currently using in the market as equivalent to be a compressed BP code to reasonably describe the fitting size of a person.

Secondly the office action erred to indicated that the size indicator system used in the market as mentioned in col. 1, lines 8-11 are derived from mathematical logic. Mathematical compression processes for body size parameters are disclosed in the subject application that was absent in the disclosure of Alsaka. **If the examiner disagrees, the examiner is respectfully requested to precise quoting the numeric numbers of a figure, column and lines of Alsaka's disclosure showing mathematical process are used to compress and decompress the body profile data.**

Thirdly, the office action interpreted the BP Code claimed corresponds to the "stored multi-digit data of the composite image of the person of Spackova" and that this multi-digit data can be further compressed by the disclosure of Alsaka to form the compressed BP Code claimed. The examiner is respectfully to note that the disclosure of Alsaka failed and short of providing a workable compression process that is applicable to compress the image data of Spackova, the uncompressed BP Code as interpreted by

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the earlier part of the office action. If the examiner disagrees, the examiner is respectfully requested to precisely demonstrate how the compression interpretation of Alsaka, a size indicator system of garment can be used to compressed the interpreted multi-digit image data of Spackova. Listed below is a quotation of MPEP 2141.02 VI:

**PRIOR ART MUST BE CONSIDERED IN ITS ENTIRETY, INCLUDING DISCLOSURES THAT TEACH AWAY FROM THE CLAIMS**

A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984)

Failure to combine the teachings of the systems in Spackova and Alsaka when each prior art is considered in its entirety, is a strong evidence of non-obviousness.

**(G) Spackova failed to perform the process of the claimed limitation:**

Regarding the second paragraph of section (D) above, the office action did not indicate if the ground of rejection was based on an assertion that the Spackova system may be capable to be used to produce the two process limitations claimed even when these process limitations are not explicitly disclosed in Spackova, to support a 103 rejection. This section is an in depth analysis if this consideration is justified. Firstly, this consideration failed to meet the normal operation condition mentioned in MPEP 2112.02 as indicated in section (A) above, so as for the system of Spackova to be applicable to reject the subject process claims. This is because the computer 80 and digital image processor 89 of Spackova are not required to perform measurements of the linear distance between two segments, or the linear distance between two indicia, in order to fulfill the normal operation of Spackova.

Secondly, in depth analysis of Spackova discovered that the system of Spackova is in fact **CANNOT** conduct reliable parametric measurement between two segments, or indicia. This is because the system of Spackova depends on a single video camera to capture the moving image of a person wearing a reference garment. There are too many variables making distance measurement out of control. Examples of these variables are the variation in orientation between the indicia located at different part of

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the body. One indicia may face at a -30 degree angle from the camera and another indicia may face a +30 degree angle from the camera at the same time. Fat people and slim people wearing reference garments of different sizes will give another level of erroneous data to the video camera of Spackova. The normal operation of Spackova, moving the orientation or limb positions of the person also adds uncontrollable complexity to the video camera system when it is required to measure linear distance between segments or indicia with acceptable accuracy. Accordingly if the ground of rejection is to be withheld, the examiner is respectfully requested to provide evidence proving that a video camera system capturing a moving human body, is able to accurately measure the real physical linear distance between two predefined segments or indicia?

As a conclusion of the analysis of sections (A) to (G) above, the systems of Spackova failed to meet the claim limitations of steps (1) to (3). Besides the teachings of Alsaka and Spackova, when each considered entirely and according to the interpretation of the office action, are impossible to be combined. Withdrawal of the ground of rejection of the subject claims is respectfully requested.

[End of Remark]